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Supreme Court, U.S.
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No.

In The

Supreme Court Of The United States

October Term, 1990

MARY DETWILER,

Petitioner,

v.

CITY OF AKRON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT, SUMMIT COUNTY, OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the right to a fair trial, under the Sixth and Fourteenth Amendments, demands that a defendant charged with trespass and other misdemeanors at an abortion clinic be allowed to present evidence to the jury in support of her claim that her conduct was privileged under the common law because it was necessary to save human life beyond the first trimester of pregnancy.

LIST OF PARTIES

The parties to the criminal and appellate proceedings in the state courts were Petitioner, Mary Detwiler, as Defendant in the Akron Municipal Court and Appellant in the Court of Appeals, and the City of Akron, as Plaintiff in the Akron Municipal Court and Appellee in the Court of Appeals.

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OPINIONS BELOW

The Entry of the Ohio Supreme Court denying jurisdiction is not reported and is printed in the Appendix, p. A-1.

The Decision and Journal Entry of the Court of Appeals, Ninth Judicial District, Summit County, Ohio is not reported and is printed in the Appendix, p. A-2.

The Judgment of Conviction of the Akron Municipal Court is not reported and is printed in the Appendix, p. A-20.

The Findings of Fact and Conclusions of Law of the Akron Municipal Court are not reported. They are printed in the Appendix, p. A-22.

JURISDICTION

The Court of Appeals for the Ninth Judicial District, Summit County, Ohio, entered its Decision and Journal Entry on July 5, 1990, affirming the Judgment of Conviction entered against Mary Joan Detwiler, Petitioner in this case, on November 15, 1989. At her trial,

Petitioner was prevented from introducing any evidence in support of her claim that her presence at the abortion clinic on May 6, 1989 was necessary to save human life, despite her argument that her defense did not conflict with this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). Petitioner then timely filed an appeal and motion for certiorari with the Ohio Supreme Court. The Ohio Supreme Court dismissed the motion and appeal on December 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

U.S. CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

U.S. Constitution, Amendment VI:

> ...[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .

U.S. Constitution, Amendment XIV, Section l:

> ...[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Akron City Code § 130.02:

> "*PRIVILEGE*." An immunity, license, or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office, or relationship, or growing out of necessity.

Akron City Code § 131.08 (B)(1):

> (B) No person, without privilege to do so, shall do any of the following:
>
> (1) Knowingly enter or remain on the land or premises of another;...

STATEMENT OF THE CASE

This is a Petition for Certiorari from the affirmance by the Ninth District Court of Appeals, Summit County, Ohio of the Judgment of Conviction entered in favor of the City of Akron against Mary Joan Detwiler on November 15, 1989 in Akron Municipal Court Case No. 89 CRB 3282.

Prior to trial, Petitioner filed a motion and a memorandum to allow the introduction of medical and other evidence in support of her defense of necessity. After a hearing, the motion was denied and the Akron Municipal Court subsequently issued Findings of Fact and Conclusions of Law (the "Findings") in support of the denial. At the motion hearing, Petitioner's counsel expressly raised the issue of whether *Roe v. Wade*, 410 U.S. 113 (1973), prevented the defense of necessity.

Following a timely appeal to the Ninth District Court of Appeals, Summit County, Ohio, the appellate court affirmed the trial court on all issues by its Decision and Journal Entry of July 5, 1990. The first assignment of error to the Court of Appeals stated as follows:

> The trial court below deprived appellant of her constitutional right to due process of law by refusing to allow appellant to present the common law defense of necessity and to introduce expert medical evidence in support thereof.

A timely notice of appeal to the Supreme Court of Ohio was filed with the Court of Appeals on August 6, 1990 and a copy of that notice, together with a memorandum in support of jurisdiction, was filed with the Supreme Court of Ohio on September 4, 1990. Treating the appeal as a motion for an order directing the Court of Appeals for Summit County to certify its record, the Supreme Court of Ohio, on December 19, 1990, overruled the motion and dismissed the appeal *sua sponte* on the grounds that no substantial constitutional question was involved. This Petition for Certiorari ensued in due course.

The facts material to a consideration of this case are as follows: on Saturday, May 6, 1989, Petitioner, a 27-year old housewife and mother, then of four, now of five, arrived with other persons at 839 East Market Street, Akron, Ohio, at approximately 8:00 a.m., to try to

save the lives of unborn children scheduled for abortion and death that day at the Akron Center for Reproductive Health (*Akron Municipal Court Trial Transcript Vol. I, 149*, hereinafter "*Tr.*") a second floor tenant of the commercial building at that address (*Tr. Vol. II, 322 & ff*). She found pro-abortion protestors already on the premises, chiefly on the second floor balcony area of the building near the second floor entrance to the abortion clinic. Petitioner took up a position in an unenclosed outside stairwell area of the premises next to the adjacent parking lot and open to the public. However, she was not in front of the stairs to the second floor (*Tr. Vol. II, 329*). Throughout the day until the time of her arrest, Petitioner sang hymns and otherwise conducted herself in a peaceful manner in this common area (*Tr. Vol. II, 331*). Petitioner at no time entered any portion of the premises leased to the abortion clinic. She remained, with her friends, in approximately the same area, until the point of her arrest. After being arrested, booked and fingerprinted, she was transported to the Power Street correctional facility and incarcerated before being released on her own recognizance.

SUMMARY OF ARGUMENT

The Ohio courts denied Petitioner her fundamental right to present a complete defense to misdemeanor trespass. Specifically, the Ohio courts excluded all evidence at trial which related to Petitioner's necessity defense. In holding that the necessity defense is unavailable to pro-life trespassers with respect to abortions of pregnancies beyond the first trimester, the Ohio courts have ignored this Court's declarations in *Roe v. Wade*, 410 U.S. 113 (1973) and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), that the State has a compelling interest in the potentiality of human life beyond the first trimester of pregnancy and have misapplied the holdings of these cases. The Ohio courts have thus deprived Petitioner and an entire class of criminal defendants of their fundamental right to present a complete defense to the jury.

ARGUMENT

I. THE RIGHT OF CRIMINAL DEFENDANTS TO A REASONABLE OPPORTUNITY TO BE HEARD IS A FUNDAMENTAL RIGHT IN THE AMERICAN SYSTEM OF JURISPRUDENCE.

This Court unequivocally has held that the right of criminal defendants to be heard, i.e., the " right to [one's] day in court," is a *fundamental right* in the American system of jurisprudence. *See In re Oliver*, 333 U.S. 257, 273 (1948).

The opportunity to be heard includes *the right to offer testimony*. *Oliver*, 333 U.S. at 273. Indeed, this Court has held:

> The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. See, *e.g.*, *Morgan v. United States*, 298 U.S. 468, 479-80; *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349, 368-69 (1936). And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime. *Cf. Washington v. Texas*, 388 U.S. 14 (1967); *In re Oliver*, 333 U.S. 257, 273 (1948).

Jenkins v. McKeithen, 395 U.S. 411, 429 (1969). This Court has reiterated this fact many times, without regard to the nature of the alleged crime or the motivation of the accused. *See e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

This vital and sacred right to be heard was denied Petitioner in the case presently before this Court.

II. THE OPPORTUNITY TO PRESENT A *COMPLETE DEFENSE* IS INCLUDED WITHIN THE PENUMBRA OF THE FUNDAMENTAL RIGHT OF CRIMINAL DEFENDANTS TO BE HEARD.

The Court has held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). As such, the right to present a *complete defense to*

the jury is within the penumbra of the Sixth and Fourteenth Amendment rights to present a complete defense.

This Court has held that under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with notions of fundamental fairness, which notions include an opportunity to present a complete defense:

> We have long interpreted this standard of fairness to require that criminal defendants be afforded a *meaningful opportunity to present a complete defense*.

California v. Trombetta, 467 U.S. 479, 485 (1984) (emphasis added). *See Crane*, 476 U.S. at 690; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington*, 388 U.S. at 23; and *Oliver*, 333 U.S. at 273. In fact, this Court has concluded that:

> [J]urors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof ... of petitioner's act."

Davis v. Alaska, 415 U.S. 308, 317 (1974).

This fundamental right provides, as Justice White once expressed it for the Court:

> [A]n accused with the right to be tried by a jury of his peers [which gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Duncan v. Louisiana, 391 U.S. 145, 156 (1968). This fundamental right is nowhere more important than in cases such as Petitioner's where the issues are highly charged and highly susceptible of bias and overzealous prosecution. This Court has never held that an entire class of criminal defendants, i.e., pro-life protesters accused of trespass, are not entitled to present a complete defense to their juries.

The opportunity to present a complete defense is an empty one indeed if the State may exclude competent, reliable evidence that is central to a defendant's claim of innocence. *Crane*, 476 U.S. at 690; *see also Specht v. Patterson*, 386 U.S. 605, 610 (1967). Petitioner's right to a complete defense was rendered entirely empty when the Ohio courts refused her the opportunity to present her necessity defense to the jury.

III. PETITIONER WAS DEPRIVED OF HER OPPORTUNITY TO PRESENT HER NECESSITY DEFENSE TO THE JURY, IN VIOLATION OF HER CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

Petitioner seeks from this Court only the opportunity *to present her necessity defense to the jury*, which defense is recognized in Ohio. *See State v. Sappienza*, 84 Ohio St. 63, 95 N.E. 381 (1911); *State v. Milam*, 108 Ohio App. 254, 156 N.E.2d 840, 843 (1959).

The necessity defense has been presented to the jury in many states, including Ohio. *See, e.g., United States v. McKnight*, 427 F.2d 75 (7th Cir.), *cert. den.*, 400 U.S. 880 (1970) (in defense of illegal importation of heroin); *State v. Procter*, 51 Ohio App.2d 152, 367 N.E.2d 908 (1977) (prison escape); *Castle v. United States*, 347 F.2d 492 (D.C. Cir.), *cert. den.*, 381 U.S. 929 (1964), 381 U.S. 953, *pet. reh. den.*, 382 U.S. 874 (1965), *cert. den.*, 388 U.S. 915 (1967) (illegal drug distribution); *People v. Luther*, 394 Mich. 619, 232 N.W.2d 184 (1975) (prison escape); *People v. Harmon*, 394 Mich. 625, 232 N.W.2d 187 (1975) (prison escape); *United States v. Lopez*, 885 F.2d 1428 (9th Cir. 1989), *cert. den.*, 110 S.Ct. 748 (1990) (prison escape); *People v. Unger*, 66 Ill.2d 333, 362 N.E.2d 319 (Ill. 1977) (prison escape); *United States v. Contento-Pachon*, 723 F.2d 691 (9th Cir. 1984) (unlawful narcotics distribution); *State v. Burton*, 103 A. 962 (R.I. 1918) (traffic laws in wartime); *The William Gray*, 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (embargo laws); *Woods v. State*, 121 S.W.2d 604 (Tex. 1938) (leaving scene of accident).

The necessity defense is central to Petitioner's defense since charges against pro-life trespassers are generally dropped when the necessity defense is permitted. *See, Necessity As A Defense To A Charge of Criminal Trespass In An Abortion Clinic*, 48 U. Cin. Law

Rev. 501, 502 n. 11 (1979) *citing Ohio v. Rinear*, No. 78CRB-3706 (Mun. Ct. Hamilton County, Ohio, decided May 2, 1978). It has been asserted that such charges are dropped *precisely* to avoid setting a precedent which would enable pro-life protesters successfully to defend their alleged trespasses. *See Necessity As A Defense To A Charge of Criminal Trespass In An Abortion Clinic*, 48 U. Cin. Law Rev. at 502 n. 11 (1979).

IV. PETITIONER COULD HAVE SUSTAINED HER BURDEN OF PROOF WITH RESPECT TO HER NECESSITY DEFENSE.

The Court has held that the necessity defense is available if the criminal action was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense. *United States v. Bailey*, 444 U.S. 394, 410 (1980).

In considering the matter, courts have routinely held that the necessity defense is not intended to excuse criminal activity by those who merely disagree with the decisions and policies of the lawmaking branches of government. *See United States v. Kabat*, 797 F.2d 580, 591 (8th Cir. 1986), *cert. den.*, 481 U.S. 1030 (1987). Petitioner does not assert the necessity defense merely because she disagrees with the decisions and policies of the lawmaking branches of government with respect to the right to an abortion.

The Court has held that a vital element of any necessity defense is the *lack of a reasonable alternative* to violating the law, i.e., a "chance both to refuse to do the criminal act and also to avoid the threatened harm." *Bailey*, 444 U.S. at 410.

The Court has required a threshold showing on the part of those who assert an affirmative defense to a crime and if testimony supporting one element is insufficient to sustain it, the trial court and jury need not be burdened with testimony supporting other elements of the defense. *Bailey*, 444 U.S. at 416. Nonetheless, where constitutional rights directly affecting the ascertainment of guilt are implicated, rules of evidence may not be applied mechanistically to defeat the ends of justice. *See Chambers*, 410 U.S. at 302.

Petitioner was unconstitutionally deprived of the opportunity to present evidence to the jury concerning these issues and could have,

if so permitted, supported her defense with a preponderance of the evidence, as required by Ohio law. *See Sappienza*, 95 N.E. 381.

Specifically, Petitioner could have shown, if she had been permitted to do so, that her actions met all the requirements of Ohio common law for assertion of a necessity defense. These requirements are considered as follows:

> (1) ***The threatening or triggering harm outweighed (or at least equaled) the harm designed to be avoided by the statute defining the alleged offense. This is an objective matter and is not to be based upon Petitioner's subjective view at the time of her conduct. Moreover, this issue, as framed below, has not been decided by this Court.***

This Court has held that the State has an "important and legitimate interest in protecting the potentiality of human life." *Roe v. Wade*, 410 U.S. 113, 162 (1973); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 428 (1983). Moreover, the Court has held that after the end of the first trimester of pregnancy the State's interest becomes compelling. *Roe*, 410 U.S. at 163; *Akron Center*, 462 U.S. at 429. Indeed, at viability, this interest in protecting the potential life of the unborn child is so important that the State may proscribe abortions altogether. *Roe*, 410 U.S. at 163-64; *Akron Center*, 462 U.S. at 428.

These interests of the State in the "potentiality of human life" have been furthered by the courts in other contexts. For example, unconstitutional discrimination against pregnant women has been condoned as part of industrial fetal protection policies, *see, e.g., Int'l Union, United Auto. Aerospace and Agricultural Implement Workers of America UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) and *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) and in connection with airline safety, *see Levin v. Delta Air Lines*, 730 F.2d 994 (4th Cir. 1984) and *Harriss v. Pan American World Airways*, 649 F.2d 670 (9th Cir. 1980). How can it be said that business entities *must* protect the *health* of the unborn when Petitioner *may not* protect the very *life* of the same unborn?

Further, as part of the objective basis for use of the defense, Petitioner proffered previously recorded testimony of a medical ex-

pert, and other documentary evidence, showing the *scientific* grounds for concluding that a fetus is alive. Medical references proffered are listed in Appendix B to this Petition.

In this respect,the Ohio courts have misapplied the principles of *Roe* and *Akron Center*, *supra*. *See*, *e.g.*, *Fairfield Commons Condominium Assn. v. Stasa*, 30 Ohio App.3d 11, 506 N.E.2d 237 (1985), *cert. den. sub. nom.*, *Moriarty v. Fairfield Commons Condominium Assn.*, 479 U.S. 1055 (1987) (abortion protests not justified by legal necessity because United States Supreme Court has found that abortions are not illegal); *Dayton v. Drake*, 1990 WL 121890 (Ohio App.) (necessity defense unavailable because abortion performed prior to viability is not illegal act); and in Petitioner's case, *Detwiler v. Akron*, C.A. No. 14385 (9th App. Dist. 1990) at 5 (necessity defense unavailable because abortion performed prior to viability is not illegal act); An Ohio appellate court has stated that:

> Through judicial decision and legislative determination denying abortion recognition as a harm, the law has preempted the central inquiry of the necessity defense; whether the activity sought to be stopped or the criminal conduct employed to stop it is the "greater harm." By denying abortion classification as a harm the law has determined that the greater harm per se is in the criminal conduct. The defense of necessity which has been created by the law may not, therefore, be employed to justify or excuse it.

Kettering v. Berry, 57 Ohio App.3d 66, ___ N.E.2d ___ (1990).

Other courts that have held the necessity defense inapplicable to trespass of abortion clinics have often based their decisions on the fact that *first trimester* abortions are legal, *see Necessity As A Defense To A Charge of Criminal Trespass In An Abortion Clinic*, 49 U. Cin. Law Rev. at 513, including n. 99, *citing State v. Balch*, No. CR10-94874 (C.P. New London County, Conn., decided March 7, 1978) (oral opinion); *United States v. Balch*, No. 64684-77 (D.C. Super. Ct., decided Dec. 19, 1977) (oral opinion); *State v. Rasmussen*, 5 Fam. L. Rep. 2037 (BNA) (Mun. Ct. Hennepin County, Minn. Nov. 21, 1978); or that abortions *in general* are legal, *e.g.*, *Hoffart v. State*, 686 S.W.2d 259 (Tex. App. 14 Dist. 1985), *cert. den.*, 479 U.S. 824, *reh. den.*, 479

U.S. 977 (1986); *State v. Brechon*, 352 N.W.2d 745 (Minn. 1984); *Sigma Reproductive Health Center v. Maryland*, 297 Md. 660, 467 A.2d 483 (1983); *St. Louis v. Klocker*, 637 S.W.2d 174 (Mo. App. 1982); *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981); *People v. Stiso*, 93 Ill. App.3d 101, 416 N.E.2d 1209 (Ill. App. 1981).

Notwithstanding the erroneous holdings of the courts cited above, this Court *has not determined* whether the harm of trespass *outweighs* the State's compelling interest in the "potentiality of human life" *beyond the first trimester of pregnancy* as these interests have been declared by this Court in *Roe* and *Akron Center*, *supra*. This Court has never declared a compelling interest in avoiding trespass. Indeed, the dissent in the Ohio Court of Appeals wrote in Petitioner's case:

> I would recognize the common law defense of necessity. However, the burden of proving that defense is upon the defendant. To my mind, she must establish that an abortion was about to be performed upon a specific woman who was more than three months pregnant or upon a minor at any stage of pregnancy where the applicable laws dealing with notice and parental consent have not been complied with. The Supreme Court has approved the legality of abortions through the first trimester. Until the Court decides when a fetus is a person, I see no reason to deny the defense of necessity to those who believe that the fetus is viable and is a person at more than the third month of pregnancy. At least it would get the issue squarely before the U.S. Supreme Court who must eventually decide the issue.

Detwiler v. Akron, C.A. No. 14385 at 22 (9th App. Dist. 1990) (Mahoney, J., dissenting).

The director of the Akron Center for Reproductive Health testified at Petitioner's trial that abortions of pregnancies *beyond the first trimester* were scheduled on the date of Petitioner's alleged trespass. *See Tr. Vol. I, 159*. Petitioner testified that she was at the Akron Center for Reproductive Health solely to save unborn babies from abortion. *See Tr. Vol. I, 326*.

With respect to abortions of pregnancies beyond the first trimester, Petitioner's purpose was in accord with this Court's declaration of the State's compelling interest in the potentiality of human life. Petitioner was seeking to save lives in which the State has asserted a compelling interest.

Therefore, there can be no doubt that Petitioner had sufficient evidence to present to the jury the factual question as to whether there were pregnancies beyond the first trimester scheduled for abortion and whether Petitioner's purpose was in fact to prevent such abortions. Petitioner was unconstitutionally deprived the jury's judgment on this factual question.

(2) ***The threatening or triggering harm was imminent with no reasonable alternative to Petitioner's conduct.***

Courts have often excluded necessity defense evidence when alternative courses of action were available to avert the harm, such as opportunities for speech and political participation. *See, e.g., United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985) (damage to government property to redress concerns regarding U.S. policy on nuclear war); *Wilson v. State*, 777 S.W.2d 823 (Tex. App.- Austin 1989) (seizure of university president's office to stop apartheid); and *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972) (damage to government property to move U.S. to terminate involvement in Southeast Asia).

Petitioner could have shown that, *as to a particular abortion beyond the first trimester which was scheduled for the date of Petitioner's alleged trespass*, other opportunities for educational and political participation would have been futile or non-existent. In this respect, Petitioner could have distinguished her facts from many cases cited by the trial court. *See* Appendix A-22. For example, pro-life trespassers have been denied the necessity defense because the desire to impart *information* regarding abortion was not a valid basis for the necessity defense in that there were viable alternatives to trespassing such as public sidewalk picketing and dissemination of information through print and television media. *See Cleveland v. Sabo*, Cuyahoga App. Nos. 41999 and 42004 (decided May 14, 1981), 1981 WL 4949 (Ohio App.) and *Cleveland v. Sundermeier*, 48 Ohio App.3d 204, 549

N.E.2d 561 (1989). As set forth above, Petitioner testified that her *sole purpose was to save unborn babies*.

Courts have also excluded the necessity defense in the absence of a showing that there was a sufficient causal relationship between the act committed by the defendant and avoidance of the asserted "greater harm." *See, e.g., Simpson*, 460 F.2d 515 (damage to government property not sufficient to move U.S. to terminate involvement in Southeast Asia). Petitioner could have shown a *direct casual relationship* between her alleged trespass and protection of the State's admitted compelling interest in potential human life, such as the fact that no abortionist arrived to perform abortions at the Akron Center for Reproductive Health until after 4:00 P.M. on the date of Petitioner's alleged trespass. *Tr. Vol. I, 150-151*.

Therefore, there can be no doubt that Petitioner had sufficient evidence to present to the jury the factual question as to whether alternatives existed to Petitioner's conduct. Petitioner was unconstitutionally deprived of the jury's judgment on this factual question.

(3) *Petitioner reasonably believed her action was necessary to avoid a threatening or triggering harm.*

One of the essential features of necessity or duress defense is the sense of present, imminent, immediate and *impending death* or serious bodily injury. *State v. Cross*, 58 Ohio St.2d 482, 391 N.E.2d 319, 323 (1979), *citing Sappienza*, 95 N.E. 381 and *State v. Procter*, 151 Ohio App.2d 152, 367 N.E.2d 908 (1977).

The Director of the Akron Center for Reproductive Health testified at trial that second trimester pregnancies were scheduled for abortion on the day of Petitioner's alleged trespass. *See Tr. Vol. I, 159*. Moreover, Petitioner testified that she knew abortions would be performed on the date of her alleged trespass because "Most abortion clinics are in operation on Saturdays. In fact, that's one of the biggest days." *Tr. Vol. I, 326*. Furthermore, Petitioner testified that her *sole purpose* in being present at the abortion clinic on Saturday, May 6, 1989, was to save unborn babies from death. *Tr. Vol. I, 326*.

Therefore, there can be no doubt that Petitioner had sufficient evidence to present to the jury the factual question as to whether

Petitioner sensed the immediate and impending death of lives in which the State has declared it has a compelling interest. Petitioner was unconstitutionally deprived of the jury's opinion on this issue.

(4) ***Petitioner was free from any fault in bringing about the threatening or triggering harm.***

There was no evidence presented at trial that Petitioner was at fault in bringing about the threatening or triggering harm.

(5) ***The defense of necessity cannot have been preempted by a legislative enactment.***

There was no evidence presented at trial that the defense of necessity has been preempted by Ohio legislation.

V. PETITIONER'S LACK OF PRIVILEGED CONDUCT, AS AN ELEMENT OF THE ALLEGED MISDEMEANOR, WAS NOT PROVED BEYOND A REASONABLE DOUBT BY THE PROSECUTION.

Proof of the lack of privilege is an element of the misdemeanor of trespass and, as such, must be proved beyond a reasonable doubt. *State v. Isaac*, 44 Ohio Misc. 87, 337 N.E.2d 818 (M.C. 1975); *Beachwood v. Cohen*, 29 Ohio App.3d 226, 504 N.E.2d 1186 (App. 1986); *Mariemont v. Wells*, 33 Ohio Misc.2d 9, 514 N.E.2d 764 (M.C. 1986); *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). *See In re Winship*, 397 U.S. 358, 364 (1970).

The relevant definition of necessity as charged by the trial court is:

> "[P]rivilege" means an immunity, license or right conferred by law or bestowed by express or implied grant or arising out of status, position, office, or relationship, or *growing out of necessity*.

Akron City Code Sec. 130.02 (emphasis added). Only one form of lack of privilege was shown by the prosecution, i.e., *lack of consent* by those charged with custody and control of the Akron Reproductive Health Center on the date of Petitioner's alleged trespass.

The trial court incorrectly excluded all evidence as to necessity. Therefore, Petitioner is entitled to a reversal of the judgment against

her as a matter of law because there was no proof whatsoever as to the element of trespass regarding privilege created by necessity. *See Sundermeier*, 549 N.E.2d at 565, *citing Beachwood*, 504 N.E.2d 1186.

CONCLUSION

For the reasons and per authorities cited, this Petition for a Writ of Certiorari should be granted. This Court should review the issues of whether Petitioner was unconstitutionally deprived of a meaningful opportunity to defend herself, whether the defense of unborn children beyond the first trimester of pregnancy is permitted by the common law defense of necessity, and whether all elements of Petitioner's alleged trespass offense were proved beyond a reasonable doubt.

Respectfully submitted,

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APPENDICES

APPENDIX A

The Supreme Court of Ohio

1990 TERM
To wit: December 19, 1990
Case No. 90-1707
ENTRY

City of Akron,

Appellee,

v.

Mary Detwiler,

Appellant.

Upon consideration of the motion for an order directing the Court of Appeals for Summit County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Daniel G. Laporte.

(Court of Appeals No. 14385)

THOMAS J. MOYER
Chief Justice

In The Court Of Appeals

Ninth Judicial District
State Of Ohio
County Of Summit
C.A. NO. 14385

CITY OF AKRON

Plaintiff-Appellee

v.

MARY DETWILER

Defendant-Appellant

APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT OF THE COUNTY OF SUMMIT, OHIO

CASE NO. 89 CRB 3282

DECISION AND JOURNAL ENTRY

Dated: July 5, 1990

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

QUILLIN, P. J. Defendant-appellant, Mary Detwiler, appeals her convictions for criminal trespass in violation of Akron City Code 131.08(B)(l), disorderly conduct in violation of Akron City Code 132.01(A)(4), and resisting arrest in violation of R.C. 2921.33. We affirm.

On May 6, 1989, Detwiler met with other anti-abortion activists at Summit Mall. She and a group of approximately sixty other activists went to the premises occupied by the Akron Center for Reproductive Health, Inc. ("Clinic") at 839 East Market Street, at approximately 7:30 a.m., in order to prevent women from entering the clinic and from obtaining abortions.

Detwiler positioned herself near the staircase which led to the entrance of the Clinic on the second floor. Detwiler and the other members of her group would stand and lock arms, at the direction of the group's organizers, anytime a person who might be a patient

approached the staircase. There were also activists positioned at the west side of the building, blocking the employee's entrance. At 9:04 a.m., the police officers began to arrest the individual members of the group. As the police officers asked each individual, including Detwiler, to leave, each individual went "limp." As a result, the officers were forced to carry one hundred and ten individuals to the field booking area and then to the transport vehicles. Only the last male activist walked through this procedure. A jury found Detwiler guilty of resisting arrest, criminal trespass and disorderly conduct.

Detwiler raises eleven assignments of error.

ASSIGNMENT OF ERROR 1

> "The trial court below deprived appellant of her constitutional right to due process of law by refusing to allow appellant to present the common law defense of necessity and to introduce expert medical evidence in support thereof."

Detwiler contends that based on the common law defense of necessity, her conduct was privileged, and thus not in violation of the criminal trespassing ordinance and was permissible under the disorderly conduct ordinance.

In *Cleveland* v. *Sundermeier* (1989), 48 Ohio App. 3d 204, the defendant sought to introduce evidence of necessity as a defense for trespassing. The defendant argued that it was necessary for him to warn women seeking an abortion of potential psychological complications from the procedure because the Cleveland Center for Reproductive Health did not adequately warn of this post-abortion trauma. *Id.* at 207. The court stated:

> "The defense of necessity excuses criminal acts when the harm which results from compliance with the law is greater than that which results from a violation of the law. See LaFave & Scott, *Criminal Law* (1972) 381, Section 50. Furthermore, necessity is not a defense if alternatives to the criminal act existed. See *Cleveland* v. *Sabo* (May 14, 1981), Cuyahoga App. Nos. 41999 and 42004, unreported, at 6-7...

> "We do not find the defendant's desire to impart the information a valid basis for his defense. Further, as the trial court ruled, Sundermeier had other alternatives to trespassing such as public sidewalk picketing and the dissemination of information through print and television media. Thus, we find the trial court properly refused to allow the jury to consider the defendant's necessity defense."

Id. at 207-08.

In *Fairfield Commons Condominium Assn.* v. *Stasa* (1985), 30 Ohio App. 3d 11, appellants claimed that their attempts to stop abortions from taking place on appellee's property was a legal necessity which justified their trespass. However, the Sixth District Court of Appeals upheld the trial court's determination that the protesting of abortions was not a legal necessity justifying appellants' activities because the United States Supreme Court has found that abortions are not illegal. *Id.* at 22-23.

Detwiler contends that, unlike the participation of protestors in acts of civil disobedience where their conduct is not causally related to the avoidance of the threatened harm because the protest itself cannot save lives, her conduct could save lives.

The necessity defense justifies conduct which otherwise would lead to civil or criminal liability because the conduct is socially acceptable and desirable under the circumstances. Note, Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic (1979), 48 U. Cin. Law Rev. (1979) 501, 502. When rare and extraordinary circumstances force an individual to choose between obeying the law or breaking it to avoid a greater harm, society prefers that the individual choose the lesser evil which promotes some value higher than the value of literal compliance with the law. *Id.* at 502-03.

The common law elements of necessity are: (1) the harm must be committed under the pressure of physical or natural force, rather than human force; (2) the harm sought to be avoided is greater than, or at least equal to that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; (4) the actor must be without fault in bringing about the situation; and (5) the

harm threatened must be imminent, leaving no alternative by which to avoid the greater harm. *Id.* at 504.

However, some states now permit the defense of necessity where the source is human force, such as in the prison escape context. *Id.* at 509. When the harm eminates [sic] from a human source, the harm must be unlawful before the necessity defense can be used. *Id.* at 513. Because an abortion performed prior to viability is not an illegal procedure, see *Roe* v. *Wade* (1973), 410 U.S. 113; *Webster* v. *Reproductive Health Services* (1989), 106 L. Ed. 2d 410, courts that have found the necessity defense inapplicable base their decision on the absence of an unlawful act. Moreover, the legality of an abortion also affects whether Detwiler chose the lesser harm. While Detwiler believes that an abortion is the taking of a life, the present state of the law is that abortion can be a legal termination of pregnancy.

Detwiler contends that there were no legal or less harmful alternatives because judicial or legislative means could not save the fetus about to be aborted. As a result, the threatened harm was imminent.

However, because the Supreme Court of the United States has determined that a woman has a fundamental right to decide to terminate her pregnancy, at least during the first trimester, there was no need for Detwiler to look for a less harmful alternative. The statutory defense of necessity was rejected in *Erlandson* v. *State* (Tex. App. 1988), 763 S.W. 2d 845, certiorari denied (1989), 107 L. Ed. 2d 110. Accordingly, we hold that the trial court properly determined that the privilege of necessity was inapplicable to this case because the imminent harm of abortion, which Detwiler sought to avoid, was not a legally recognized harm. Therefore, the trial court properly excluded the evidence which Detwiler sought to introduce. The assignment of error is overruled.

ASSIGNMENT OF ERROR 2

> "The trial court deprived the appellant of her constitutional right to a trial by a jury selected from among her peers by certain aspects of the trial court's inquiries to the venire panel and by refusing to allow counsel to make other inquiries."

Detwiler contends that she was prevented from uncovering pertinent bias and prejudices of the potential jurors because the trial court prevented her from inquiring as to (1) whether any female juror had had an abortion; (2) what the juror's feelings were on abortion; (3) whether the jurors believed that an unborn child is a human life; and (4) the religious background of prospective jurors.

Generally, the scope of the examination of prospective jurors is within the discretion of the trial court and the judgment will only be reversed upon a showing that the trial court abused its discretion in restricting the scope of voir dire. *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 186.

The record reflects that while Detwiler was precluded from asking the prospective jurors these four questions, she was permitted to inquire as to whether the fact that Detwiler was at an abortion clinic when she was arrested, or that Detwiler had a different opinion on the issue of abortion than any of the jurors, would influence whether the juror believed that Detwiler violated the law. She was also permitted to inquire as to whether the jurors could put their personal opinion aside, listen to the evidence, and determine the case based on the evidence. Accordingly, Detwiler was allowed sufficient latitude in voir dire to establish whether the prospective jurors could set aside their opinions and approach the matter impartially and could render a judgment based on the evidence.

Detwiler also contends that the trial court improperly excluded three veniremen for cause. We disagree.

In reviewing whether the trial court erred in refusing to excuse a juror for cause when the juror expressed the belief that the defendant must have done something or he would not be in court, but then stated that she would follow the law, the Supreme Court of Ohio held:

> "***Crim. R. 24 stated in part:
>
> "'(B) Challenge for cause. A person called as a juror may be challenged for the following causes:
>
> "'***.
>
> "'(9) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; *but no person* summoned as a juror *shall* be disqualified *by reason*

> *of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.*' (Emphasis in original.)
>
> "Whether a prospective juror will follow the law as given by the court is a matter within the discretion of the trial judge and we will not disturb the court's ruling on a challenge for cause, absent an abuse of discretion. *State* v. *Scott* (1986), 26 Ohio St. 3d 92, 26 OBR 79, 497 N.E. 2d 55; *State v. Williams* (1983), 6 Ohio St. 3d 281, 6 OBR 345, 452 N.E. 2d 1323.***."

State v. *Henderson* (1988), 39 Ohio St. 3d 24, 27.

Accordingly, veniremen should not be excluded for cause simply because they voiced a general objection or expressed religious scruples which could affect their opinion. See *Witherspoon* v. *Illinois* (1968), 391 U.S. 510, 522; *Jenkins*, *supra*, at 179. We need only be satisfied that the potential juror is unwilling to consider all the evidence presented because of his personal opinions and was committed to voting against, or in favor of, Detwiler regardless of the facts and the law as given by the court. See *Jenkins*, *supra*, at 182.

William carpenter, the first potential juror to be excluded, was questioned by the court as follows:

> "***.
>
> "As I indicated, this event took place on May 6th. It was an abortion protest on East Market Street.
>
> "Is there anyone present who has any specific knowledge about that incident either through your own personal knowledge or discussion with anyone else or by reading or hearing anything about it in the news media?
>
> "When I ask you these questions, I'm asking you as a group but I want you to respond as an individual. If anyone has such information, please respond by raising your hand.

"All right, sir. What is the knowledge you have of the circumstances?

"JUROR: It was through the local media, and I wholeheartedly support what they was doing.

"THE COURT: All right, sir. Do you feel that as a result of your opinion –

"JUROR: Oh, yes. I couldn't be on this Jury, not on this matter.

"THE COURT: All right, sir. Your name is, sir?

"JUROR: William Carpenter.

"THE COURT: *All right, Mr. Carpenter. One of the purposes for the questions to be asked is to determine whether or not individuals have opinions as strongly held as Mr. Carpenter's that they feel would prevent them from serving impartially and fairly on a Jury for this issue.*

"If you have such an opinion, and you do not feel that you can lay that opinion aside, then you must indicate that to this Court.

"Mr. Carpenter as a result of the information that you've received regarding this and as a result of your opinion on this issue, do you feel that you cannot set that aside and act impartially?

"JUROR: *No, ma'am, I couldn't. I'm strongly against abortion.*

"THE COURT: All right, Mr. Carpenter. This Court on its own Motion then will excuse you for cause. Thank you very much for being with us this morning, sir.

"***." (Emphasis added.)

(T.O.P. 8-10).

Based on Mr. Carpenter's response that because of his knowledge about this specific incident on May 6th and his personal

opinion on the issue of abortion, he could not set these aside and act impartially, we cannot say that the trial court erred in excluding Mr. Carpenter for cause.

Patricia Mahovich, the second potential juror was questioned as follows:

"***.

"JUROR: I'm a Roman Catholic and am strictly against abortion.

"THE COURT: All right, ma'am. What is your name?

"JUROR: I'm number 20, (inaudible) Mahovich.

"THE COURT: As a result of your personal religious beliefs, do you feel that you could not set those beliefs aside to fairly and impartially try this matter?

"JUROR: No.

"THE COURT: Thank you very much, Mrs. Mahovich. I appreciate –

"MR. BUZZI: Your Honor –

"THE COURT: Yes.

"MR. BUZZI: – could we inquire? I think the Court is asking the Juror to set aside her convictions and that places the Juror in a position where –"

"***.

"THE COURT: ***.

"Mrs. Mahovich, I want to be sure that you understand that if you cannot set aside any ideas that you have or any preconceived opinions and enter into this matter impartially and be sure you can assure this Court that you can fairly hear this matter, then we will excuse you if you are unable to that, ma'am.

"JUROR: (Inaudible)

"THE COURT: All right. Thank you very much.***."

(T.O.P. at 10-12).

Based on Mrs. Mahovich's response that a result of her personal religious beliefs, she could not set aside her opinions and ideas and fairly and impartially hear this case, we cannot say that the trial court erred in excluding Mrs. Mahovich for cause.

Carolyn Williams, the third potential juror, was questioned as follows:

"JUROR: I am also a born again believer in Jesus Christ and I do not go for abortion. Positively.

"THE COURT: You feel that would affect your impartiality in this matter?

"JUROR: Oh, I would go for the baby —

"THE COURT: Thank you, ma'am. And you are?

"JUROR: Carolyn Williams.

"THE COURT: Thank you, Mrs. Williams. We appreciate your statement. Please see Miss Coleman.

"Yes, ma'am."

(T.O.P. 12-13).

Based on the trial court's previous instructions concerning fairness and impartiality and Ms. Williams statement that she would "not go for abortion" and would find for "the baby", we can not say that the trial court erred in excluding Ms. Williams for cause.

The assignment of error is overruled.

ASSIGNMENT OF ERROR 3

"The trial court refused to grant appellant's motion for a mistrial on the grounds referred to in assignment of error no. 2."

Because we find no prejudicial error in the voir dire conducted by the trial court, the assignment of error is overruled.

ASSIGNMENTS OF ERROR

"4. The trial court refused to grant appellant's motion for a directed verdict on the charge of criminal trespass, which motion was made on the grounds that no evidence had been introduced as to the relationship of the complaining witness, Akron Center for Reproductive Health, to the operator of the abortion clinic, nor as to the right of either to control the common areas at 839 E. Market Street where the alleged illegal activities took place.

"8. The trial court in its charge to the jury regarding the elements of criminal trespass refused to specify that appellant must be found guilty beyond a reasonable doubt of knowingly entering or remaining on the land or premises of Akron Center for Reproductive Health without privilege to do so on May 6, 1989, as specified in the complaint."

Because both assignments of error raise the same issues, they will be addressed together.

Akron City Code 131.08(B)(l) provides:

"No person, without privilege to do so, shall do any of the following:

"(l) Knowingly enter or remain on the land or premises of another;"

"***."

Detwiler contends that the trial court improperly instructed the jury because it failed to specify the parties to the lease agreement in order to clarify for the jury what constitutes "another" in this instance. We disagree.

A property owner may trespass upon his property even though he is its legal owner when he enters the property without the permission of the party who has custody and control. See *State* v. *Herrin* (1982), 6 Ohio App. 3d 68, 69. In its jury instruction, the trial court defined land or premises as provided in Akron City Code 131.08(A) which states:

"(A) For the purpose of this section, '*LAND OR PREMISES*' includes any land, building, structure, or place

belonging to, controlled by, or in custody of another, and any separate enclosure or room, or portion thereof."

"* * *."

The lease agreement specifies on page eighteen that all notices which are properly served on the lessee, shall be addressed as "Greenwich Medical Enterprises, Akron, Inc., Akron Center for Reproductive Health, Suite 5 and 6 - 839 East Market Street, Akron, Ohio 44305." The lease provides the lessee with the space located on the second floor (Suites 5 and 6) together with the joint use with other tenants, of the parking facilities and all walks and hallways.

Carol Harding testified that while this particular lease had expired, its terms were carried forward on a month-to-month basis while the parties negotiated a new lease.

Accordingly, the trial court properly left the factual issue of which party had custody and control to the jury.

The assignments of error are overruled.

ASSIGNMENTS OF ERROR

"5. The trial court refused to grant appellant's motion for directed verdict, and appellant's reiterated motion for acquittal, on the charge of disorderly conduct as a minor misdemeanor, which motions were made on the grounds that the elements of the principal crime were not proved.

"6. The trial court refused to grant appellant's motion for directed verdict, and reiterated motion for acquittal, on the charge of disorderly conduct as a fourth degree misdemeanor, which motions were made on the grounds that no evidence was introduced of any warning to cease and desist the alleged disorderly conduct.

"9. The trial court failed to charge the jury with respect to the charge of aiding and abetting disorderly conduct to the effect that before appellant can be guilty of aiding and abetting, all of the elements of the principal crime must be proved beyond a reasonable doubt."

Because these assignments of error raise similar issues, they will be addressed together.

Detwiler contends that the city failed to prove that a principal offense was committed because there was no evidence that any member of the group was ordered to cease and desist. As a result, she could not be convicted of aiding and abetting another in the commission of disorderly conduct. She also contends that asking the protesters to leave the premises is not proof of notice to cease and desist. We disagree.

Akron City Code 132.01(A)(4) provides:

> "(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:
>
> "***.
>
> "(4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act which serves no lawful and reasonable purpose of the offender;"
>
> "***."

This section is identical to R.C. 2917.11(A)(4).

Akron City Code 132.01(E), identical to R.C. 2917.11(E), provides:

> "Whoever violates this section is guilty of disorderly conduct, a minor misdemeanor. If the offender persists in disorderly conduct after reasonable warning or request to desist, disorderly conduct is a misdemeanor of the fourth degree."

The element necessary under R.C. 2917.11(E) to prove a case for the fourth-degree misdemeanor is the persistence of proscribed behavior after a reasonable warning or request to desist. *State* v. *Reynolds* (1985), 25 Ohio App. 3d 59, 60.

In this instance, after Carol Harding, the executive director of the Clinic, requested that the group leave, Captain Larry Givens of the Akron Police Department instructed the group that they were engaged in unlawful activity and that denying access to the premises was a

course of disorderly conduct. Captain Givens then asked the group to leave the premises and told them that if they chose not to leave they would be arrested. He warned the group a second time when one of the officers was injured. Finally, each individual was asked to leave before they were taken to the booking facility. We cannot say that the trial court erred in leaving the question of whether Detwiler received reasonable warning or request to desist to the jury. See *Cleveland* v. *Egeland* (1986), 26 Ohio App. 3d 83, 87.

Detwiler also contends that because this case involves "free speech", the scope of the disorderly conduct statute is limited to situations where "fighting words" are involved.

Detwiler testified that she was not present at 835 East Market to demonstrate or to picket, but rather to do the affirmative act of saving lives. Accordingly, the offensive speech provisions are not applicable in this instance.

The assignments of error are overruled.

ASSIGNMENT OF ERROR 7

> "The trial court refused to grant appellant's motion for directed verdict on the charge of resisting arrest, which motion was made on the grounds that the evidence was undisputed that appellant was placed under arrest prior to being transported to the field booking area."

Detwiler contends that the police officers failed to inform her that she was under arrest or for what reason she was to be arrested in violation of R.C. 2935.07. As a result, she could not be guilty of resisting something that was unannounced.

R.C. 2935.07 provides in part:

> "Person arrested without warrant shall be informed of cause of arrest.
>
> "When an arrest is made without a warrant by an officer, he shall inform the person arrested of such officer's authority to make the arrest and the cause of the arrest.
>
> "***.

"When a person is engaged in the commission of a criminal offense, it is not necessary to inform him of the cause of his arrest."

R.C. 2921.33(A) provides:

"No person, recklessly or by force, shall resist or interfere with a lawful arrest of himself or another."

The record reflects that Detwiler was present when Captain Givens instructed the group at approximately 8:43 a.m. Captain Givens testified on cross-examination that he warned the entire group that they were engaging in unlawful activity; that their conduct, by denying access to the premises, was a course of disorderly conduct; and that they had already been asked to leave by Carol Harding. He also instructed the group that they were considered trespassers. Captain Givens also testified that at that point, he asked them to leave the premises, and if they chose not to leave, they would be arrested on those two charges. He also requested that if, in fact, they were arrested, would they please walk through the booking process into the transport vehicle. The group was given a few minutes to consider the statement and then Sergeant Jay Carano began arresting individuals at 9:04 a.m. Captain Givens also testified that at approximately 11:20 a.m., he gave a second warning when one of his officers was injured as a result of carrying these people.

Sgt. Carano testified that he approached Detwiler and asked her if she would leave; that he waited approximately fifteen seconds; that she either refused to answer or said no, that she went limp and then was picked up by four other officers; that she was placed on a stretcher and was carried to the booking area which was about ten to fifteen feet away; that she was then photographed, fingerprinted and carried onto a bus where she remained on the floor; that as the sixty-seventh person to be arrested in this manner, she was able to witness sixty-six prior arrests. Sgt. Carano also testified that if Detwiler had said that she would leave, she would have been allowed to leave.

Detweiler testified that she was present when captain Givens told the group that if they did not leave, they would be subject to arrest; that he then asked them to leave but that she chose not to leave; that she was present when Carol Harding was speaking and when Captain Givens made his second request for the people to stand and to walk to

the booking area; that she was aware of the prior arrests, and had seen the arrest procedure for the sixty-six prior cases; that Sgt. Carano requested her to leave at approximately 1:00 p.m.; and that she fell into the "fetal position" and went limp.

Based on this evidence, we cannot say that her arrest was in violation of R.C. 2935.07. Detwiler also contends that once the arrest took place, she could not be charged pursuant to R.C. 2921.33 because she submitted to police authority by making no movement to contest their authority. We disagree.

First, when Detwiler relaxed her muscles and "went limp," she could properly be charged with resisting arrest. See Committee Comment to R.C. 2921.33.

Second, the existence of an arrest is dependent upon the presence of the following elements (1) an intent to arrest, (2) under real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested. *State* v. *Barker* (1978), 53 Ohio St. 2d 135, paragraph one of the syllabus. For purposes of R.C. 2921.33, a lawful arrest occurs when the defendant surrenders or submits to police authority or when the police officers obtain control over the defendant. *State* v. *Huffman* (1987), 38 Ohio App. 3d 84, 86. In this instance, the police officers requested that the entire group, including Detwiler, leave the premises or, at the very least, walk to the booking facilities and then to the transport vehicle. Detwiler did neither of these. Instead, she forced police officers to carry her through the procedure. Therefore, we cannot say that the trial court erred in overruling the motion for a directed verdict where reasonable minds could differ as to whether she submitted to police authority.

The assignment of error is overruled.

ASSIGNMENT OF ERROR 10

"The trial court allowed the appellant to be convicted of two or more allied offenses of similar import in violation of R.C. Section 2941.25(A)."

While R.C. 2941.25(A) provides that a defendant can be convicted of only one count of a crime where the defendant's conduct

constitutes two or more allied offenses of similar import, R.C. 2941.25(B) provides for a conviction on multiple counts where the offenses are of dissimilar import, or are committed separately, or committed with separate animus as to each. *State* v. *Bickerstaff* (1984), 10 Ohio St. 3d 62, 65.

In this instance Detweiler contends that because her conduct remained the same from the time she arrived at 898 East Market Street until her incarceration, all three offenses constitute allied offenses of similar import.

We have no record of the sentencing proceeding which would evidence whether this issue was raised before the trial court. Therefore the claim of error has been waived. *State* v. *Comen* (1990), 50 Ohio St. 3d 206, 211.

The assignment of error is overruled.

ASSIGNMENT OF ERROR 11

> "The trial court failed to charge the jury that the Constitution of The United States and the laws of the State of Ohio, under certain circumstances, provide that property such as the Louis Stile Building may be an appropriate location for the peaceful expression of opinion and limited physical activity by persons expressing their right to free speech."

Detwiler contends that because a group of advocates who were adverse to her beliefs were present and because the premises were visible to the public and contained more than one tenant, that her activities were protected under the First Amendment of the United States Constitution as an exercise of free speech. We disagree.

Detwiler testified that she was not present at the clinic to demonstrate or to picket on that day, that she had picketed in the past but that this time she went to rescue babies. Assuming, *arguendo*, that her activities would be protected speech, we hold that the property at 835 East Market Street does not lose its private character merely because the public is generally invited to use it for designated purposes. See *Sundermeier*, *supra*, at 205-207. Nor do we believe that Detwiler has presented sufficient factors to distinguish her case from *Sundermeier*, *supra* on this issue. Accordingly, Detwiler and other

members of her group could properly be excluded from the entrances of the premises without violating their right to free speech. See *Fairfield Commons Condominium Assn., supra*, at 18-20.

The assignment of error is overruled.

The judgment is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit, Akron Municipal Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

DANIEL B. QUILLIN
FOR THE COURT

CIRIGLIANO, J.
CONCUR

MAHONEY, J.
CONCURS IN PART AND DISSENTS IN PART SAYING:

I would affirm the judgments of conviction on all three charges. However, I would sustain the tenth assignment of error as to merger under R.C. 2941.25 of the charges of trespassing and disorderly conduct. This is so obvious from the record, that one could say it was plain error for the court not to merge the trespassing and disorderly conduct.

I concur in the judgment only in overruling the first assignment of error. I would recognize the common law defense of necessity. However, the burden of proving that defense is upon the defendant. To my mind, she must establish that an abortion was about to be performed upon a specific woman who was more than three months pregnant, or upon a minor at any stage of pregnancy where the

applicable laws dealing with notice and parental consent have not been complied with. The Supreme Court has approved the legality of abortions through the first trimester. Until the court decides when a fetus is a person, I see no reason to deny the defense of necessity to those who believe that the fetus is viable and is a person at more than the third month of pregnancy. At least it would get the issue squarely before the U.S. Supreme Court who must eventually decide the issue.

I would also sustain the second assignment of error as to the individual venire member's views on abortion. However, the trial court's general inquiry averted any prejudicial error.

APPEARANCES:

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MUNICIPAL COURT OF AKRON
Journal Entry

STATE OF OHIO — MARY DETWILER
COUNTY OF SUMMIT — VS — 89 CRB 3282
CITY OF AKRON

Defendant having been fully informed of his rights pursuant to Crim. Rule 5, to which the court attests by initialing this space ___ has entered his plea to the charges. And the matter being duly heard and the court being fully advised in the premises and having asked whether defendant has anything to say as to why judgment should not be pronounced against him and defendant not showing sufficient cause, it is the sentence of the law and judgment of the court that defendant pay

PLEA TO CHARGES ___Guilty _X_Not Guilty ___No Contest
DATE_____EXCEPTIONS_____
TRIAL HAD 9-25-89 DATE____ _x_Found Guilty _Not Guilty

COUNT #1: FINE OF $ 200 and costs AND BE IMPRISONED IN THE _x_ CITY WORKHOUSE _____ COUNTY JAIL FOR THE TERM OF PSI
OTHER 30 days Power St. suspended 30 upon condition Defendant obey all laws for one year. 6 months to pay.

COUNT #2: FINE OF $ costs only AND BE IMPRISONED IN THE _x_ CITY WORKHOUSE ____COUNTY JAIL FOR THE TERM OF 30 days Power St. Suspended
OTHER 30 upon condition Defendant obey all laws for one year and serve 40 hours community service at Battered Women's Shelter supervised by probation. 6 months to pay.

COUNT #3: FINE OF $ costs only AND BE IMPRISONED IN THE _x_ CITY WORKHOUSE ___ COUNTY JAIL FOR THE TERM OF 30 days Power St. Suspended
OTHER 30 upon condition Defendant obey all laws for one year and serve 40 hours community service at Battered Women's Shelter supervised by probation. 6 months to pay.

SUBSEQUENT COURT ORDERS: Sentence stayed for 30 days pending appeal. 11-15-89 Jane Bond

CASE NO. 89 CRB 3282 ASSIGNED Bond

MUNICIPAL COURT OF AKRON
LAWRENCE J. WALSH, CLERK OF COURT

DEFENDANT JANE DOE # 67 MARY JANE DETWILER

ATTORNEY Paul Buzzi 376-5297 PHONE 696-1777/692-1172

DATE OF ARREST/CITE 5-6-89

CHARGES:

CT # 1 Resisting

CT # 2 Criminal Trespass

CT # 3 Disorderly Conduct

In The Municipal Court Of Akron Summit County, Ohio

CASE NO. 89 CRB 3282
JUDGE BOND

CITY OF AKRON

PLAINTIFF

v.

MARY JOAN DETWILER

DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing on September 19, 1989, upon motion in limine filed by the City of Akron and a motion for determination of the admissibility of evidence by the Defendant. The case proceeded to trial on September 21, 1989.

Rulings on both motions were issued prior to trial. Defendant requested findings of fact and conclusions of law be issued by this Court as related to the evidentiary hearing.

Accordingly, this Court makes the following findings of fact and conclusions of law:

Defendant was charged with Criminal Trespass, ACC 131.08; Disorderly Conduct, ACC 132.01(A)(4) and Resisting Arrest, R.C. 2921.33.

On May 6, 1989, Defendant voluntarily and intentionally went to the premises occupied by the Akron Center for Reproductive Health, Inc. in the City of Akron. Akron Center for Reproductive Health, Inc. operates on those premises a clinic at which abortions are performed in accordance with Ohio law. Abortions are performed at those premises regularly six days per week.

The Defendant entered the premises without permission of the owner or occupant, intending by her physical presence and actions to prevent women from entering the clinic. Defendant intended to prevent abortions from being performed and thereby possibly avoiding or hindering the death of an unborn infant.

The actions taken by Defendant together with other individuals were initiated by her, planned in advance and under her control at all times. Defendant was under no legal duty or obligation. Defendant could repeat this conduct at will whenever she chose to do so.

Defendant by pretrial motion sought to introduce testimony to rebut evidence to be presented by the prosecution to prove that Defendant's entry on the property was without privilege.

The proffered evidence includes:

1. Testimony of friends of the Defendant that she reasonably believed her actions on May 6, 1989, were necessary to avoid or hinder the deaths of unborn infants.

2. Expert medical testimony that the life of a human being begins at conception.

3. Demonstrative evidence of videotapes and ultrasound records showing the activities of a fetus in the womb.

The prosecution is required to prove as an element of the offense of criminal trespass that the Defendant, without privilege to do so, entered or remained on the land or premises of another. ACC 131.08. "Privilege" means an immunity, license or right conferred by law, bestowed by express or implied grant, or rising out of status, position, office, or relationship, or growing out of necessity. ACC 130.02. See R.C. 2901.01(L).

Defendant argues her entry on the property was privileged because it was necessary. Defendant further argues this is not an affirmative defense pursuant to R.C. 2901.05(C)(2). However, that issue need not be addressed to dispose of the issue before this Court.

While there is no question that evidence of a privilege growing out of necessity is admissible regarding the charge of criminal trespass, the issue is whether based on the facts and the proffer of Defendant, the particular testimony and evidence sought to be introduced are relevant pursuant to Evid. R. 401 and 402. Relevancy cannot be determined without examining what does and does not constitute a "privilege growing out of necessity" as set forth by statute.

In construing an ordinance, this Court may consider pursuant to ACC 10.14 (C):

1. The object sought to be attained;

2. The circumstances under which the ordinance was enacted;

3. The legislative history;

4. The common law or former legislative provisions, including laws upon the same or similar subjects;

5. The consequences of a particular construction;

6. The administrative construction of the ordinance.
(R.C. 1.149).

In construing this statute consideration is given to the legislative history, the common law, decisions of other jurisdictions, the consequences of construction and the distinctions between justification and civil disobedience.

The language of the Akron City Code is identical to the State code for the offense of criminal trespass. While there is no statutory definition of necessity, privilege is discussed in the Committee Comments to H.B. 511, the enacting legislation for R.C. 2901.01(L).

> All of the four separate types of conduct defined as criminal trespass require that such conduct be unprivileged. "Privilege" is defined in new section 2901.01 of the Revised Code, and, with respect to trespass, is conceived as being broader than permission as such. It may include permission, or it may include a privilege growing out of necessity, or by reason of an emergency, or persons in good faith answering a call for help or otherwise performing good offices in adverting danger could claim that an otherwise unauthorized intrusion is privileged. Persons taking shelter from danger might claim privilege- the classic rule that vessels in distress may tie up at a private dock is an example of this type of justification. Police, inspectors, and other public servants can claim that an intrusion is privileged within the proper exercise of their duties. These examples are not exhaustive.

The nature of the defense of necessity is explained by W. LaFave & A. Scott, Jr., *Criminal Law* §50 (1972):

One who, under the pressure of circumstances, commits what would otherwise be a crime may be justified by "necessity" in doing as he did and so not be guilty of the crime in question. With the defense of necessity, the pressure must come from the physical forces of nature (storms, privations) rather than from other human beings. (When the pressure is from human beings, the defense, if applicable, is called duress rather than necessity.) Also, the pressure must operate upon the mind of the defendant rather than upon his body. (When A and B are standing atop a precipice, and an earthquake causes A to stumble against B, throwing B over the cliff to his death, A's defense to a homicide charge is not that of necessity, for A's mind did not will his body against B's; instead, his defense is that he did no "act" (a willed movement), and one cannot be guilty of a crime of action without an act.) But when A, starving to death, takes and eats B's food to save his own life, or when A in an emergency intentionally kills B to save C and D, he may be eligible for the defense of necessity.

The rationale of the necessity defense is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires. Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law. The law forbids stealing and murder, for there are positive values in the right to property and the right to life; but (as in the case of the starving man) it is better to save a life than to save the property, and (in the case of the killing of B to save C and D) it is better that two lives be saved and one lost than that two be lost and one saved.

The matter is often expressed in terms of choice of evils: When the pressure of circumstances presents one with a choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil. Thus the evil involved in

> violating the terms of the criminal law (taking another's property; even taking another's life) may be less than that which would result from literal compliance with the law (starving to death; two lives lost)." Id. at 381-82.

See also 1 *Wharton's Criminal Law* §88 (13th ed. 1972); R. Perkins, *Criminal Law* 956-61 (2d ed. 1969); Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289 (1974).

Both the common law and precedent in Ohio recognize the defense of necessity.

Prior to the enactment of R.C. 2901.01 necessity was recognized as a defense to trespass in Ohio. In *Fulton v. Monahan* (1831), 4 Ohio 427, the Court considered necessity as a justification for invasion of a private right. Although no case in Ohio defines necessity as a privilege to trespass, some guidance is provided in the use of "necessity" in the former criminal code regarding Sunday labor laws, G.C. 13045. "Necessity . . . arises from conditions or circumstances caused by an agency either in whole or in part, over which man has no control." *Straka v. State* (1914), 25 Ohio Dec. 436, 437, 16 Ohio N.P.(n.s.) 554.

This is consistent with the commentator's view expressed by LaFave and Scott above, necessity is the pressure of circumstances over which the individual has no control. These circumstances set up the forced choice which the individual must face. Once these circumstances have been created, the choice is between mutually exclusive alternatives. The individual facing the impending harm either breaks the law by one action or by complying with the law, suffers the alternative harm.

The choice must be forced and there must be no legal alternative. This principle was discussed by the United States Supreme Court in *United States v Bailey*, 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed 2d 575 (1980). The Court discussed the defenses of necessity and duress and stated, 444 U.S. at 410, 100 S. Ct. at 634:

> . . . the defense of necessity or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two

> evils.... one principal [sic] remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defense [of necessity] will fail.

Nine cases have dealt with the legitimacy of the necessity defense against charges of criminal trespass at abortion clinics. All find the defense inapplicable: *Cleveland v. Municipality of Anchorage,* 631 P. 2d 1073 (Alaska 1981); *Gaetano v. United States,* 406 A. 2d 1291 (D.C. 1979); *People v. Stiso,* 93 Ill. App. 3d 101, 48 Ill. Dec. 687, 416 N.E. 2d 1209 (1981); *People v. Krizka,* 92 Ill. App. 3d 288, 48 Ill. Dec. 141, 416 N.E. 2d 36 (1980); *City of St. Louis v. Klocker,* 637 S.W. 2d 174 (Mo. App. 1982); *Sigma Reproductive Health Center v. Maryland,* 297 Md. 660, 467 A. 2d 483 (1983); *Hoffart v. Texas* (1985 Tex. App. Houston (14th Dist.)), 686 S.W. 2d 259, *cert. den.* ___U.S. ___, 93 L. Ed. 2d 46, 107 S. Ct. 95, *reh. den.* 479 U.S. 977, 93 L. Ed 2d 423, 107 S. Ct. 478; *State v. Horn* (1985 App.) 126 Wis. 2d 447, 377 N.W. 2d 176, *aff'd.* 139 Wis. 2d 473, 407 N.W. 2d 854; *Pursley v. State* (1987), 21 Ark. App. 107, 730 S.W. 2d 250. *See also, Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic,* 48 U. Cin. L. Rev. 501 (1979).

The defense of necessity has also been uniformly rejected in trespass cases at nuclear energy or weapons sites and defense contracting sites. *Commonwealth v. Capitolo* (1985), 508 Pa. 372, 498 A. 2d 806 (reversing *Commonwealth v. Capitolo* (1984), 324 Pa. Super. 61, 471 A. 2d 462); *In Re Weller* (1985) 1st Dist. 164 Cal. App. 3d 44, 210 Cal. Rptr. 130; *Schermbeck v. State* (1985 Texas App. Dallas), 690 S.W. 2d 315; *State v. Champa* (1985 RI), 494 A. 2d 102; *State v. Marley* (1973), 54 Hawaii 450, 509 P. 2d 1095. See generally collected cases 41 ALR 4th 773, *Trespass: State Prosecution for Unauthorized Entry or Occupation for Public Demonstration Purposes, of Business, Industrial or Utility Purposes.*

The defense of necessity has been denied in a case of trespass in two churches in Washington, D.C. where defendants and others entered on a winter night "for the express purpose of opening the doors of these buildings to homeless persons living in Washington, D.C. to protect them with shelter for the night." *Griffin v. United States* (D.C.

1982), 447 A. 2d 776, *cert. den.*, ___ U.S. ___, 103 S. Ct. 1879, 76 L. Ed. 2d 810 (1983).

The defense of necessity has frequently been raised in escape cases where a prisoner seeks to justify an escape by the threat of harm present in the prison. *United States v. Bailey*, 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980); *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974).

Examining the common law and recent case law certain principles may be extracted as required elements of the defense of necessity.

1. The Defendant is faced with circumstances or conditions caused by an agency over which she has no control.

2. The Defendant as a consequence of the circumstances must elect a course of action between unavoidable alternatives.

3. The choice of alternatives must require the Defendant to intentionally undertake an illegal act to prevent or alleviate an imminent public or private injury.

4. The injury to be avoided must be greater than the harm done by the illegal act. This is an objective determination and not controlled by the good faith belief of the Defendant.

5. There must be no reasonable legal alternative to avoid the imminent harm.

If each of these elements is present, then necessity as creating a privilege to trespass has been stablished [sic].

The Defendant bases her defense on her entry onto the clinic property intending to place herself between the entrance and women attempting to enter the clinic for the purpose of abortion. This she argues would result in avoiding or hindering the loss of life of unborn infants.

In considering each element applied to Defendant, it is apparent that there were no circumstances beyond the control of Defendant which placed her in an unavoidable situation. She intentionally went to the clinic on May 6, 1989, to prevent others from entering into the building. There was nothing unique or compelling at that particular

time or place. There was no exterior compulsion upon the Defendant to act in any manner.

The imminent harm which Defendant sought to avoid, abortion, was neither imminent nor a legally recognized harm. Assuming a woman was prevented from entering the clinic on May 6, 1989, Defendant's action does not prevent the woman from obtaining an abortion. Although abortion may be morally objectionable to Defendant and others, it is not a legally recognized injury either public or private. Those seeking to enter the clinic had a right to be free from criminal interference. Even assuming arguendo, the abortion to be prevented was a greater harm than the injury of the trespass, the possibility of achieving that result was remote at best.

The action of Defendant was more symbolic than active prevention of an imminent harm. Given the essentially symbolic nature of Defendant's action, there are reasonable legal alternatives to use to convince others of the harm of abortion and achieve the end she seeks.

Another factor to consider in construing the privilege of necessity is the consequence of a particular statutory construction. If a privilege to trespass is permitted under these facts, any individual could enter a clinic or hospital at any time and justify trespass to achieve the possible prevention of an abortion.

Defendant does not characterize her action as protest or speech. She argues this was not a demonstration. She asserts that her conduct was privileged and she is therefore not guilty of illegal trespass.

This contention is in sharp contrast to the individual who from moral or personal conviction as an act of conscience, commits an illegal act. Civil disobedience may be undertaken to dramatize social injustice, abuse of power or an arbitrary law. But those who so protest do not seek to avoid the legal sanctions imposed or claim their beliefs justify an exemption from the validity of the law itself. See generally, *Civil Disobedience and Violence*, Wadsworth Publishing Co., Jeffrie G. Murphy, 1971, Social Protest and Civil Obedience, Sidney Hook, p. 53.

> The rights to free speech, to assembly and to petition the government for grievances are a cornerstone of the American system. So, too, is the right to be free from

criminal interference. These appellants trespassed on the rights of others and did so without excuse. *Gaetano v. United States*, 406 A. 2d 1291, 1295 D.C. App. 1979, 631 P. 2d at 1081-82.

The privilege of necessity is not applicable in this case.

Jane Bond
Judge

cc: Mr. Douglas Powley, Chief City Prosecutor
Messrs. Robert Melnick, Daniel G. Laporte and Paul Buzzi, Attorneys for Defendant

APPENDIX B

MEDICAL REFERENCES

Contemporary scientific evidence clearly concludes that the life of a human being begins at conception, the time when the process of fertilization is complete. There is an overwhelming agreement on this point in countless medical, biological, and scientific writings. The following examples form only a limited sample from the scientific literature:

> *Zygote*. This cell results from fertilization of an oocyte by a sperm and is *the beginning of a human being*.
>
> * * *
>
> *Development begins at fertilization*, when a sperm unites with an oocyte to form a zygote (from the Greek zygotus, meaning "yoked together"). Each of us started life as a cell called a zygote.

K. Moore, *The Developing Human* 1, 12 (2d ed. 1977).

> In this first pairing, the spermatozoon has contributed its 23 chromosomes, and the oocyte has contributed its 23 chromosomes, thus re-establishing the necessary total of 46 chromosomes. The result is the conception of a unique individual, unlike any that has been born before and unlike any that will ever be born again.

M. Krieger, *The Human Reproductive System* 88 (1969).

> [A]ll organisms, however large and complete they may be when full grown, begin life as but a single cell.This is true of the human being, for instance, who begins life as a fertilized ovum . . .

I. Asimov, *The Genetic Code* 20 (1962).

> It is the penetration of the ovum by a spermatozoon and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of *fertilization* and marks the initiation of the life of a new individual.

B. Patten, *Human Embryology* 43 (3d ed. 1968).

> The formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into

a combined cell, or zygote, which definitely marks the beginning of a new individual.

L. Arey, *Developmental Anatomy* 55 (7th ed. 1974)

A human being originates in the union of two *gametes*, the ovum and the spermatozoon.

J. Roberts, *An Introduction to Medical Genetics* 1 (3d ed. 1963).

Bisexual reproduction is characteristic of all vertebrates, and *gametogenesis* (the production of *germ cells*) is its first phase. The next phase, the beginning of the development of a new individual, is the fusion of two germ cells (*gametes*) of different nature; one, the *spermatozoon* from the male parent; the other, the *ovum* from the female parent. The result of this fusion is the formation of the first cell of the new individual, the *zygote* .

W. Hamilton & H. Mossman, *Human Embryology* 14 (4th ed. 1972).

The *zygote* thus formed [by the moving together of two sets of chromosomes] represents the beginning of a new life.

J. Greenhill & E. Friedman, *Biological Principles and Modern Practice of Obstetrics* 23 (1974).

The *zygote* is the starting cell of the new organism.

S. Luria, *Thirty-Six Lectures in Biology* 146 (1975).

A new individual is initiated by a union of two gametes - a male gamete, or *spermatozoon*, and a female gamete, or *mature ovum* .

J. Brash, *Human Embryology* 2 (1956).

Fertilization is significant in that new life is created, but specifically the cardinal features of fertilization are that (1) the diploid number of chromosomes [46] is reconstituted and (2) the sex of the conceptus is designated chromosomally.

J. Thomas, *Introduction to Human Embryology* 52 (1968).

A new individual is inaugurated in a single cell (zygote) that results from the- union of a male gamete (spermatozoon) with a female gamete (ovum or egg).

T. Torrey, *Morphogenesis of the Vertebrates* 47 (3d ed. 1971).

> The fertilized egg cell - or zygote - contains nuclear material from both parents. It marks the beginning of the life of a new human being and is a useful focal point for presenting all the diverse aspects of organic reproduction.

G. Simpson & W. Beck, *Life: An Introduction to Biology* 139 (2d ed. 1965).

No. 90-1468

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IN THE

Supreme Court of the United States

October Term, 1990

MARY DETWILER,
Petitioner,

vs.

CITY OF AKRON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT SUMMIT COUNTY, OHIO.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The parties to the criminal and appellate proceedings in the state courts were Petitioner, Mary Detwiler, as Defendant in the Akron Municipal Court and Appellant in the Court of Appeals, and the City of Akron and the State of Ohio, as Plaintiffs in the Akron Municipal Court and Appellees in the Court of Appeals.

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No. 90-1468

IN THE

Supreme Court of the United States

October Term, 1990

MARY DETWILER,
Petitioner,

vs.

CITY OF AKRON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT SUMMIT COUNTY, OHIO.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATUTORY PROVISIONS INVOLVED

AKRON CITY CODE

§132.01 Disorderly conduct

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following: . . .

(4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act which serves no lawful and reasonable purpose of the offender; . . .

OHIO REVISED CODE

§2921.33 Resisting arrest

(A) No person, recklessly or by force, shall resist or interfere with a lawful arrest of himself or another.

STATEMENT OF THE CASE

On November 15, 1989, a jury convicted Mary Joan Detwiler of Resisting Arrest, Disorderly Conduct and Criminal Trespass. Petitioner was one of 110 persons arrested and removed from the entrance to an abortion clinic where they conducted what they termed a "Rescue". Each of the Petitioner's co-defendants enterd pleas to Resisting Arrest and Criminal Trespass before trial and did not appeal. Petitioner appeals only her conviction of Criminal Trespass.

The facts are that Petitioner assembled with her co-defendants on Saturday, May 6, 1989, at a shopping mall parking lot. Petitioner was driven to 839 East Market Street in Akron where she and her co-defendants encircled an exterior staircase which was the public entrance to the clinic. Co-defendants also blocked a rear entrance to the clinic. The demonstrators managed to keep the clinic closed for five hours. The group at the front entrance spent most of the time seated on the ground. However, each time a patient attempted to gain entrance, upon command, the entire group stood and locked arms creating a human wall around the staircase. The group came equipped with two-way radios, bull horns, a mobile phone and three attorneys.

The group was asked to leave the area several times by the clinic manager and by a Police Captain who also warned the group of arrest. The police asked each protester individually to leave and each refused. Upon refusal to leave, the officers arrested the protester who in each case went limp and had to be picked up and carried away. Petitioner was the 67th person to be arrested. Each arrestee refused to give his or her name and none carried identification papers. Because of these organized

tactics, the police had to carry the defendants, place numbered plastic bracelets on their wrists and take fingerprints and photographs for the purpose of later identification.

The Petitioner was released the same day on a signature bond after she gave her name and address to the jail authorities.

At trial, the Petitioner testified that her purpose was to "save unborn children". Petitioner variously stated that purpose 20 times during her testimony.

Petitioner testified that she did not know before May 6, 1989, which clinic would be their target. Petitioner did not claim to know on May 6, 1989, that pregnancies beyond the first trimester were being terminated at that clinic on that day. Petitioner offered no testimony which indicated that she was aware of the particular circumstances of any of the patients who appeared at the clinic. Petitioner's proffer of evidence consisted of testimony and exhibits in support of her belief that life begins at fertilization. Petitioner proffered no evidence indicative of any unlawful conduct on the part of the clinic's personnel or patients.

The Ohio Ninth District Court of Appeals sustained the Petitioner's convictions and the Ohio Supreme Court declined jurisdiction for the reason that Petitioner failed to raise a substantial constitutional issue.

SUMMARY OF ARGUMENT

A trial court properly excludes evidence of an affirmative defense when a defendant cannot offer evidence on each element of the defense. The affirmative defense of necessity is not available to a political protester who is charged with criminal conduct where the protester cannot demonstrate a lack of reasonable legal alternatives or where the purported harm that the protester seeks to avoid is not unlawful.

The decisions of the courts below are consistent with the decision of this Court in *United States v. Bailey*, 444 U.S. 394 (1980). Petitioner does not cite to and Respondent has not located any appellate decision, federal or state, in conflict with the decision of the trial and appellate courts below.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURTS BELOW ON THE ISSUE OF THE DEFENSE OF NECESSITY IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT, OF THE UNITED STATES COURTS OF APPEALS, OR OF ANY OF THE STATE COURTS OF LAST RESORT.

In the trial below, the Petitioner sought to raise the common law defense of necessity to the charge of criminal trespass and disorderly conduct. While recognizing necessity as an affirmative defense, the courts below held that, the Petitioner did not meet all of the elements of the defense and was therefore precluded from presenting evidence regarding her claimed defense of necessity.

For the purpose of considering the constitutional issue herein, the essential elements of the defense of necessity are that the defendant reasonably believed that her action was necessary to avoid an imminent harm, that there was no other reasonable legal alternative available to the defendant and that a direct causal relationship may be reasonably anticipated between the action taken and the avoidance of the harm. *United States v. Bailey,* 444 U.S. 394, 409-410 (1980); *United States v. Seward,* 687 F.2d 1270, 1273-1275 (10th Cir. 1982), *cert. denied,* 459 U.S. 1147 (1983); *United States v. Cassidy,* 616 F.2d 101 (4th Cir. 1979).

This Court considered the necessity defense in *United States v. Bailey,* 444 U.S. 394 (1980). In that case, the defendants escaped from a federal jail and were re-captured more than a month later. This Court approved the trial court's order to the jury to disregard the defendants' evidence concerning jail conditions, and

its refusal to instruct the jury on the defense of necessity where the defendants offered no evidence of one element of the defense, that being justification of continued absence.

> If, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.

Bailey, 444 U.S. at 416.

This Court has held that the Constitution does not guarantee a defendant in a criminal case the right to present any testimony that he or she desires. The defendant must be able to make some plausible showing of how the testimony would be both material and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *Cf. Moore v. Illinois*, 408 U.S. 786, 794 (1972), *reh'g denied*, 409 U.S. 897 (1972).

Underlying the proposition that juries should not be burdened with testimony not relevant to a permissible defense is the premise that it is not in the jury's province to decide what the law is or what it should be.

> . . . [A]s one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court.

Sparf v. United States, 156 U.S. 51, 63 (1895); *See United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *Political Protest and the Illinois Defense of Necessity*, 54 U. Chi. L. Rev. 1070, 1087-1093 (1987); Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 Stan. L. Rev. 1173, 1183-1198 (1987).

One result of permitting juries to decide the applicable law in each case, would be to permit each jury to author the law as it deems fit. The Seventh Circuit Court of Appeals held that a defendant was not entitled to a jury instruction on his claimed defense of 'compulsion' for burning selective service records. *United States v. Cullen*, 454 F.2d 386 (7th Cir. 1971). Writing the opinion for the 7th Circuit, then Circuit Judge Stevens wrote as follows:

> If the defendant's theory of defenses were valid, the character of his conduct would not be judged by the rule of law but by the end which his means were designed to serve. His theory is merely another variety of an age old argument. If a religious, moral or political purpose may exculpate illegal behavior, one might commit bigamy to avoid eternal damnation; steal from the rich to give alms to the poor; burn and destroy, not merely public records or perhaps buildings but even public servants as well, to implement a Utopian design.
>
> One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.

Cullen, 454 F.2d at 392 (citations omitted); *See Cox v. New Hampshire*, 312 U.S. 569 (1941); *Walker v. City of Birmingham*, 388 U.S. 307 (1967), *reh'g denied*, 389 U.S. 894 (1967).,

Petitioner cites no United States Circuit Court decision in conflict with the decision below. It is not for the Circuit Court's lack of consideration of the issue. The defense of necessity has been raised repeatedly by political protesters in the context of criminal offenses committed to protest war, nuclear energy and

armaments. The U.S. Circuit Courts of Appeals have consistently held that the defense of necessity is not available to political protesters who fail to prove one or more of the elements of that defense. *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987); *United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985); *United States v. Montgomery*, 772 F.2d 733 (11th Cir. 1985); *United States v. Seward*, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); *United States v. Cassidy*, 616 F.2d 101 (4th Cir. 1979); *See also, United States v. Kroncke*, 459 F.2d 697 (8th Cir. 1972); *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972). In each of the cases cited above, the Circuit Court approved the trial court's exclusion of testimony on necessity or justification defenses.

The availability of the defense of necessity to unlawful abortion protesters has been considered in the courts of several states. Petitioner has cited only one decision which supports her position—a decision from a trial court in Ohio. *Ohio v. Rinear*, No. 78 CRB-3706 (Mun. Ct., Hamilton County, Ohio, May 2, 1978). Two Ohio appellate courts (in addition to the one below), and virtually every other state court which has considered the issue, have agreed that the necessity defense is not available to unlawful abortion protesters. *City of Cleveland v. Sundermeir*, 48 Ohio App. 3d 204, 549 N.E.2d 561 (1989); *City of Kettering v. Berry*, 57 Ohio App. 3d 66, 567 N.E.2d 316 (1990); Annotation, *Trespass: State Prosecution for Unauthorized Entry or Occupation for Public Demonstration Purposes of Business, Industrial or Utility Premises*, 41 A.L.R. 4th 773.

The issue of the availability of the defense of necessity to criminal charges brought against abortion protesters has been before the court of last resort in six states and in each instance the necessity defense was precluded. *Oregon v. Clowes,* 310 Ore. 686, 801 P.2d 789 (1990); *Louisiana v. Aguillard,* 567 So. 2d 674 (La. Ct. App. 5th Cir. 1990), *writ denied,* 571 So. 2d 631 (La. 1990); *Wisconsin v. Migliorino,* 150 Wis. 2d 513, 442 N.W.2d 36 (1989), *cert. denied,* 110 U.S. 565 (1989); *Erlandson v. Texas,* 763 S.W.2d 845 (Tex. App. 14th Dist. 1988), *cert. denied,* 110 U.S. 152 (1989); *Pennsylvania v. Markum,* 541 A.2d 347 (Pa. Super. 1988), *appeal denied,* 520 Pa. 615, 554 A.2d 507 (1988), *cert. denied,* 489 U.S. 1080 (1989); *Bobo v. Texas,* 757 S.W.2d 58 (Tex. App. 14th Dist. 1988), *cert. denied,* 490 U.S. 1066 (1989); *Crabb v. Texas,* 754 S.W.2d 742 (Tex. App. 1st Dist. 1988), *cert. denied,* 110 U.S. 65 (1989); *Hoffart v. Texas,* 686 S.W.2d 259 (Tex. App. 14th Dist. 1985), *cert. denied,* 479 U.S. 824 (1986), *reh'g denied,* 479 U.S. 977 (1986); *Cleveland v. Municipality of Anchorage,* 631 P.2d 1073 (Alaska 1981).

In an additional six states and the District of Columbia, appellate courts have considered and rejected the use of the defense of necessity by abortion protesters who have been charged with criminal offenses. *Allison v. City of Birmingham,* 1991 Ala. Crim. App. LEXIS 83 (1991); *Missouri v. O'Brien,* 784 S.W.2d 187 (Mo. Ct. App. 1989); *Buckley v. City of Falls Church,* 371 S.E.2d 827 (Va. Ct. App. 1988); *Pursley v. Arkansas,* 21 Ark. App. 107, 730 S.W.2d 250 (1987); *Sigma Reproductive Health Center v. Maryland,* 297 Md. 660, 467 A.2d 483 (1983); *City of St. Louis v. Klocker,* 637 S.W.2d 174 (Mo. Ct. App. 1982); *Illinois v. Stiso,* 93 Ill. App. 3d 101, 416 N.E.2d 1209 (1981); *Illinois v. Krizka,* 92 Ill. App. 3d 288, 416 N.E.2d 36 (1980); *Gaetano v. United States,* 406 A.2d 1291 (App.D.C. 1979).

In the instant case, the trial court found that Petitioner could not demontrate a lack of reasonable legal alternatives to her illegal conduct. This finding precludes the availability of a defense of necessity. *Bailey,* 444 U.S. at 416; *Kabat,* 797 F.2d at 591; *Dorrell,* 758 F.2d at 432; *Montgomery,* 772 F.2d at 738; *United States v. Quilty,* 741 F.2d 1031, 1033 (7th Cir. 1984); *Seward,* 687 F.2d at 1276; *Cassidy,* 616 F.2d at 102. The Eighth Circuit Court of Appeals noted in *Kabat* as follows:

> Nor was it relevant that the defendant . . . offered evidence that other protest activities and political efforts had been unavailing . . .; a lack of results might mean only that the will of the majority, legitimately expressed, had prevailed. The necessity defense was never intended to excuse criminal activity by those who disagree with the lawmaking branches of government.

Kabat, 797 F.2d at 591.

The trial court and appellate court below further held that the defense of necessity was not available in a criminal case where the perceived harm that Petitioner sought to avoid was not a legally recognized harm. The Courts of last resort in Alaska, Oregon, Wisconsin and Pennsylvania are all in accord with this holding. *Cleveland,* 631 P.2d at 1079; *Clowes,* 801 P.2d at 796; *Migliorino,* 442 N.W.2d at 47; *Markum,* 541 A.2d at 350.

Petitioner seeks to vest the jury with the authority to decide legal issues and political policy regardless of what the Constitution or the majority rule of the legislature has determined. Such a rule would be contrary to the principles of democracy and the precepts of organized society. *Sparf,* 156 U.S. 51; *Kabat,* 797 F.2d

580; *United States v. May*, 622 F.2d 1000 (9th Cir. 1980), *cert. denied*, 449 U.S. 984 (1980); *Cullen*, 454 F.2d 386; *Simpson*, 460 F.2d 515; *Moylan*, 417 F.2d 1002.

Almost 100 years ago, Justice Harlan warned of the dangers of permitting a jury to be the judge of the law as well as the facts of a case.

> Public and private safety would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as, in their judgment, were applicable to the particular case being tried. . . . But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court. . . . We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence.

Sparf, 156 U.S. at 101-102.

The holdings of the courts below are consistent with the decisions of this Court and with the decisions of the Circuit Courts which have considered the issue of the political necessity defense. They are also consistent with the decisions of each of the state courts of last resort which have had occasion to consider the defense of necessity as raised by unlawful activities protesting abortion. There is no unresolved question of importance which merits this Court's attention.

II. THE QUESTION RAISED BY PETITIONER PRESUMES FACTS NOT IN THE RECORD BELOW.

Petitioner presents to this court the question of whether she had the right to raise the defense of necessity to criminal trespass charges by claiming a privilege "to save human life beyond the first trimester of pregnancy."

Petitioner overlooks her admission that, until she arrived at 839 East Market Street, she did not know what clinic she would be blockading. She made no claim in her testimony that she knew at the time of her trespass that abortions beyond the first trimester were to be performed at that clinic on that day. Petitioner did not offer that she knew the circumstances of any of the patients who appeared on May 6th. At trial, Petitioner professed her belief that life begins at conception and proffered evidence in support thereof.

Now the Petitioner attempts to frame her claimed privilege to trespass in a more limited scope by setting forth that she was attempting to save a life beyond the first trimester of pregnancy. Such was not the case in the trial below.

Petitioner is apparently more interested in placing the issue of abortion before this court than she is concerned about her conviction for criminal trespass. Respondent urges that it is not appropriate for this case to be remanded to a jury of eight persons to determine the issue of when life begins. Nor is it advisable that the parties to this action carry the burden of debating this ultimate question of humanity.

CONCLUSION

For the foregoing reasons, Petitioner has not demonstrated any of the grounds set forth in Rule 10 of this Court for granting a petition for writ of certiorari. Petitioner has not identified an unresolved question of importance arising out of the prosecution of her criminal charges. Nor has she established a conflict between the lower courts in this case and the decisions of this Court or any other appellate court. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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